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IN THE

Supreme Court of the United States

ANSON D. BENTON, SPECIALIST,
UNITED STATES ARMY,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER PETITIONER'S RIGHT TO DUE PROCESS GUARANTEED BY THE FIFTH AMENDMENT WAS VIOLATED WHEN THE PROSECUTION, WITH THE COMPLICITY OF THE MILITARY JUDGE, DELIBERATELY MISLED THE COURT INTO BELIEVING THAT PETITIONER HAD RENDERED A FULL CONFESSION TO THE CRIMES.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Anson D. Benton, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 57 M.J. 24 (2002)(Appendix A). The decision of the United States Army Court of Criminal Appeals is reported at 54 M.J. 717 (A. Ct. Cr. App.). (Appendix B).

JURISDICTION

The judgment for the Court of Appeals for the Armed Forces was entered on July 5, 2002 (Appendix A). The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1259 (3); the United States Court of Appeals for the Armed

Forces having reviewed this case pursuant to Uniform Code of Military Justice Article 67(a)(3), 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves:

1. The Fifth Amendment to the United States Constitution which provides:

No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Procedural History:

On February 5 and 12, March 26, May 12, and June 15-19, 1998, Specialist Benton [hereinafter petitioner] was tried at Fort Lewis, Washington, before a general court-martial composed of officers and enlisted members. He was charged with attempted kidnapping, conspiracy, three specifications of rape, four specifications of forcible sodomy, three specifications of assault, adultery, and communicating a threat in violation of Uniform Code of Military Justice [hereinafter U.C.M.J.] Articles 80, 81, 120, 125, 128, and 134, respectively. Contrary to his pleas, petitioner was convicted of only one specification of forcible sodomy and kidnapping, in violation of U.C.M.J. Articles 125 and 134, 10 U.S.C. §§ 925 and 934 (1996), respectively. He was sentenced to be confined for two

years and six months, to be discharged from the service with a bad-conduct discharge, to be reduced to the grade of E1, and to forfeit all pay and allowances. This sentence was approved. On January 22, 2001, despite finding error, the Army Court of Criminal Appeals affirmed the findings of guilty and the sentence. (Appendix B.)

On June 25, 2001, the United States Court of Appeals for the Armed Forces granted review on the following issues:

I.

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED BY FINDING NO PREJUDICE TO APPELLANT, DESPITE FINDING THE MILITARY JUDGE ABUSED HIS DISCRETION IN REFUSING TO PERMIT THE DEFENSE TO ELICIT THE EXCULPATORY PORTIONS OF A GOVERNMENT INTRODUCED CONFESSION.

II.

WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED BY CONCLUDING THAT A CO-ACCUSED'S ADMISSION TO A CELLMATE THAT HE THREATENED THE PETITIONER WITH A GUN AT THE TIME OF THE OFFENSES WAS NEITHER AGAINST DECLARANT'S PENAL INTEREST NOR SUFFICIENTLY TRUSTWORTHY.

A majority of the Court of Appeals for the Armed Forces rendered its opinion on July 5, 2002 (Appendix A), affirming the findings and sentence of the United States Army Court of Criminal Appeals. A strong dissent to this opinion was filed by Judge Effron.

Statement of Facts:

This case involves both the suppression of exculpatory evidence and the deliberate misleading of the trier of fact. Petitioner was charged with acting with Private First Class (PFC) Taori Ransom in a range of crimes against Ms. CM, including rape, kidnapping, and forcible sodomy. After they were apprehended, petitioner and PFC Ransom were placed in pre-trial confinement, where at different times they each shared a cell with Private (PV2) Cletis New. Before petitioner's trial, PV2 New informed the government that he had discussed the charged events with both petitioner and PFC Ransom. In exchange for the government dismissing a manslaughter charge against him and disapproving any confinement in excess of that already served at the time of his testimony, PV2 New provided a sworn, written statement to the government detailing his conversation with both men. (R. at 410-411.) The portion of the statement relating to the conversation with petitioner included the following:

> Benton told me that he and Ransom were driving around when they saw two girls in Woodbrook and they were going to "mack on them." I understood "mack" to mean sex or something. . . . Ransom got out of the car, and Benton said he saw Ransom hit one of the females on the head with a gun. Ransom then pushed the girl in the car. Benton said Ransom put the gun to his head and said "drive, drive, go," or words to that effect.
>
> Benton said he pulled over to the side of the road; Ransom did not tell him to stop. Benton said he pulled into a dead end and turned the car around. According to Benton all three people. . . got out of the car. Ransom told the girl to "hook my boy up," or words to that effect. Benton told me that the female

> victim began to undo his pants and was going to perform oral sex on him, then he changed his mind and pulled his pants up.

At trial, the government called PV2 New as a prosecution witness and elicited the substance of his statement related above as evidence of petitioner's pre-trial admission that he had participated in the crimes against Ms. CM. (R. at 406.) However, the prosecutor carefully avoided asking PV2 New about one important part of his pre-trial statement. The government elected not to elicit this information about petitioner telling PV2 New that PFC Ransom had placed a gun to his head while telling him to drive. Despite this critical omission, PV2 New told the court that petitioner had told him "everything" about the incident. (R. at 404.)

On cross-examination, petitioner's defense counsel sought to provide the remainder of PV2 New's statement to the court so they would know the entire substance of the conversation which PV2 New alleged he had with petitioner. The government objected, stating that the defense counsel's question called for inadmissible hearsay. Defense counsel contended that the statement was admissible under Military Rule of Evidence 304(h)(2), the rule of completeness pertaining to oral and written confessions or admissions by an accused. The military judge sustained the objection and precluded the testimony.

During the defense case-in-chief, petitioner elected to testify. He essentially provided the same rendition of facts as was given by PV2 New, with one major exception. He informed the court that he only performed the acts he did because he was forced to as a result of PFC Ransom placing a gun to his head. He also denied that he made any statement to PV2 New. Based on petitioner's testimony, the military judge instructed the court on the defense of duress. Petitioner was

acquitted of nearly all of the charges, but was convicted of kidnapping and forcible sodomy. On direct review, the Army Court of Criminal Appeals held that the military judge erred by precluding the defense from eliciting the remainder of PV2 New's statement. The court, however, determined that the error was harmless. This view was adopted by a majority of the Court of Appeals for the Armed Forces.

REASONS FOR GRANTING THE WRIT

This case offends all notions of fairness and integrity on which the criminal justice system is based. It stands for the proposition that the government is allowed to deliberately mislead the finder of fact. Stripped to its core, the government's strategy of proving petitioner's guilt consisted of creating a confession out of whole cloth, where none had previously existed. The prosecutor, with the complicity of the military judge, selectively introduced inculpatory statements allegedly made by petitioner. At the same time, they deliberately omitted the exculpatory information which would have put these statements into the correct context. The military judge was fully aware of the government's scheme to deceive the court members, yet he did nothing to ensure that truth was a priority in petitioner's trial. This directly contradicts any logical idea of "due process."

The strength of the petitioner's defense rested almost completely on the credibility of petitioner's testimony. The government used PV2 New's abridged testimony to undermine petitioner's credibility by deceiving the panel into thinking that petitioner had previously admitted involvement in PFC Ransom's crimes with no further explanation. When the military judge allowed this to happen, while prohibiting the defense from admitting the remainder of petitioner's context-providing statements to PV2 New, he effectively ensured that the court would believe petitioner was a liar.

Without PV2 New's testimony, the court could very well have believed petitioner's version of events. On the other hand, after PV2 New's testimony, it is extremely probable that the court concluded that the petitioner did not believe in his own defense of duress and had developed it only later for purposes of his trial. *See Beech Aircraft Corporation v. Rainey*, 488 U.S. 153, 171 (1988). Therefore, PV2 New's full testimony could certainly have altered the balance of credibility to the favor of petitioner and affected the final outcome of the case. As Judge Effron stated in his dissenting opinion in this case:

> It is also noteworthy that the prosecution's presentation was far from compelling, as evidenced by the fact that the panel members did not accept the prosecution's primary theory of the case. The prosecution's theory was that appellant and Ransom planned and executed the attack on CM. The members, however, acquitted appellant of all the specifications involving vicarious liability for the acts of PFC Ransom, as well as the specification involving conspiracy. He was convicted only of the offenses to which the duress defense was most directly applicable -- kidnapping and forcible sodomy.

United States v. Benton, 57 M.J. 24, 32-33 (2002)(Effron, J., dissenting). The deceptive editing of PV2 New's testimony undercut petitioner's credibility before he even took the stand. Consequently, the court did not believe his testimony regarding duress and convicted him of the charges for which it would have provided a defense.

When confronted with the option of providing true or false information to the factfinder, the prosecution chose the latter. What is so alarming is that the government went beyond simply not providing the whole story. Instead, they affirmatively withheld information in a calculated strategy designed to skew

the truth. This raises the vital question of whether a prosecutor's duty to prosecute within our adversarial system is a duty to convict at any cost or a duty to seek justice. Surely, this Court will not condone a tactic specifically designed to conceal the evidence rather than reveal it.

As this Court has stated, the American prosecutor plays a "special role" in the search for truth in criminal trials because he is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Strickland v. Greene*, 527 U.S. 263, 281 (1999)(internal citation omitted). The ruling of the Court of Appeals condones the government's deliberate efforts to win without regard for the cost to justice.

The Fifth Amendment to the United States Constitution guarantees all persons accused by the government of committing criminal offenses that they will not "be deprived of life, liberty, or property, without due process of law." This Court has interpreted this provision to mean that a criminal defendant must be treated with the "fundamental fairness essential to the very concept of justice." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982)(citation omitted). *See also Rochin v. California*, 342 U.S. 165, 172 (1952)(governmental conduct which "shocks the conscience" or "offend[s] even hardened sensibilities" violates due process).

An analysis of due process requires in-depth scrutiny into the fundamental fairness exhibited by the government toward the individual accused, regardless of how other individuals under similar circumstances may have been dealt with by the prosecution in the past. *Ross v. Moffitt*, 417 U.S. 600, 609 (1973). When the government "brings its judicial power to

bear" on an individual, the accused must be given a meaningful opportunity to present his defense and must be treated fairly and evenhandedly by his accusers. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

This Court has recognized the "principle that due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections." *Moran* v. *Burbine*, 475 U.S. 412, 467 (1986)(Stevens, Brennan, and Marshall, JJ., dissenting). In that vein, this Court has found a variety of circumstances where criminal proceedings lack the element of fundamental fairness and thus violate an accused person's right to due process of law. *See, e.g., Wainwright v. Greenfield*, 474 U.S. 284, 295 (1986)(use of a suspect's post-Miranda warnings silence against him violates due process); *Blackledge v. Perry*, 417 U.S. 21, 26 (1974)(vindictive prosecution violates due process); *Brady v. Maryland*, 373 U.S. 83, 86 (1963)(stating "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

Moreover, it is well established that an accused's right to due process is violated where government evidence misleads the trier of fact. *See Mooney v. Holohan*, 294 U.S. 103, 112 (1935)(holding that a prosecutor's knowing presentation of false testimony is "inconsistent with the rudimentary demands of justice"); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957)(holding that a due process violation occurs when a prosecutor fails to correct testimony he knows to be false even when the falsehood in the testimony goes only to the witness's credibility); *Giglio v. United States*, 405 U.S. 150, 155 (1972)(holding that due process required new trial where government witness testified falsely on matters relating to credibility and the prosecutor should have been aware of the falsehood). The conduct of the

government and the military judge in this case flies in the face of this principle.

This case involves both the suppression of exculpatory evidence and the deliberate misleading of the trier of fact. While the defense was provided with PV2 New's entire pre-trial statement, the fact that defense counsel was prevented from using it to elicit the truth was the practical equivalent of being denied access to it. Furthermore, as Judge Effron said in his dissenting opinion at the Court of Appeals for the Armed Forces:

> In the present case, the members were misled. The problem with PV2 New's in-court testimony is that it created the erroneous impression that petitioner had told New "everything" about the incident – and that "everything" amounted to an unqualified, inculpatory statement. In that form, New's testimony undercut petitioner's in-court testimony by making petitioner's in-court statement regarding duress appear to be a recent fabrication.

The defense attempted to ensure that the trier of fact was given the whole truth by introducing the remainder of PV2 New's oral statement using the rule of completeness, found in Military Rule of Evidence [M.R.E.] 304(h)(2). This rule, which has no counterpart in the Federal Rules of Evidence, states that "[i]f only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement." M.R.E. 304(h)(2). The policy behind this rule of completeness is to present statements that ought in fairness be considered contemporaneously with the statement introduced. *See United States v. Morgan,* 15 M.J. 128 (C.M.A. 1983).

As this Court has emphasized in discussing the common law rule of completeness, the rule was created to ensure "that the court not be misled because portions of a statement are taken out of context" and to avoid "the danger that an out-of-context statement may create such prejudice that it is impossible to repair by a subsequent presentation of additional material." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 (1988). Thus, due process in this case required that the defense be allowed to ensure that the court receive the whole story from PV2 New. The denial of this opportunity was anything but harmless.

CONCLUSION

The prosecution's presentation of a false picture of the evidence to the finder of fact irreparably prejudiced petitioner's right to due process. The court-martial should have been allowed to decide petitioner's guilt or innocence based on all of the facts, rather than the deceptively edited version of the evidence they were presented. The prosecution's deliberate deception of the court, with the military judge acting as a knowing accomplice, robbed petitioner of any hope of his right to a fair trial.

WHEREFORE, the Court should therefore grant the Petition for Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CASE OF

UNITED STATES, Appellee

v.

Anson D. BENTON, Specialist
U.S. Army, Appellant

No. 01-0289
Crim. App. No. 9800862

United States Court of Appeals for the Armed Forces

Argued October 24, 2001
Decided July 5, 2002

SULLIVAN, S.J., delivered the opinion of the Court, in which GIERKE and BAKER, JJ., joined. CRAWFORD, C.J., filed an opinion concurring in the result. EFFRON, J., filed a dissenting opinion.

Military Judges: Lawrence M. Cuculic, Debra L. Boudreau, and Stephen V. Saynisch

Senior Judge SULLIVAN delivered the opinion of the Court.

During the Spring of 1998, appellant was tried by a general court-martial composed of officer and enlisted members at Fort Lewis, Washington. Contrary to his pleas, he was found guilty of kidnapping and forcibly sodomizing CM, in violation of Articles 134 and 125, Uniform Code of Military Justice, 10 USC §§ 934 and 925. On June 19, 1998, he was sentenced to a bad-conduct discharge, confinement for two years and six

months, total forfeitures, and reduction to pay grade E-1. The convening authority approved this sentence on November 16, 1998. The Army Court of Criminal Appeals affirmed on January 22, 2001. 54 MJ 717.

This Court on June 25, 2001, granted the following two issues for review:

> I. WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED BY FINDING NO PREJUDICE TO APPELLANT, DESPITE FINDING THE MILITARY JUDGE ABUSED HIS DISCRETION IN REFUSING TO PERMIT THE DEFENSE TO ELICIT THE EXCULPATORY PORTIONS OF A GOVERNMENT INTRODUCED CONFESSION.
>
> II. WHETHER THE ARMY COURT OF CRIMINAL APPEALS ERRED BY CONCLUDING THAT A CO-ACCUSED'S ADMISSION TO A CELLMATE THAT HE THREATENED APPELLANT WITH A GUN AT THE TIME OF THE OFFENSES WAS NEITHER AGAINST THE DECLARANT'S PENAL INTEREST NOR SUFFICIENTLY TRUSTWORTHY.

We hold that the military judge's refusal to admit hearsay evidence of appellant's out-of-court pretrial statement exculpating himself was harmless error. *See United States v. Levy-Cordero*, 156 F.2d 244, 247 (1st Cir. 1998). We further hold that the trial judge did not err when he refused to admit additional hearsay testimony that appellant's co-accused purportedly exonerated appellant of the charged offenses. *See United States v. Seabolt*, 958 F.2d 231, 233 (8th Cir. 1992).

The Court of Criminal Appeals, in a detailed opinion, delineated the facts in this case and the evidence profferred by

the Government concerning appellant's liability for the kidnapping and sodomy of CM. It said:

> On the evening of 17 October 1997, the appellant and his alleged accomplice, Private First Class (PFC) Taori Ransom, spent several hours driving around in the vicinity of Lakewood, Washington, an area near Fort Lewis. The appellant, who was driving PFC Ransom's car, stopped the car at PFC Ransom's direction near two young women, CM and her cousin, PFC Ruiz. Much of CM's chilling account of her kidnapping, rape, and forcible sodomy by PFC Ransom that evening was unchallenged at trial, *although the appellant vigorously contested his criminal liability for what transpired*. Some of the evidence surrounding the offenses of which the appellant was acquitted places the challenged evidentiary rulings in context and is thus included in our discussion of the facts.
>
> **A. The Government's Case**
>
> CM and PFC Ruiz both testified that they were talking outside the home of PFC Ruiz' boyfriend when they heard a car pull up. They saw a man leave the car and walk toward them, brandishing a 9 mm semi-automatic pistol. He grabbed CM's hair and dragged her, screaming and struggling, into his car. When PFC Ruiz attempted to aid her cousin, the man struck PFC Ruiz across the forehead with the pistol. The appellant then drove off with the man in the back seat with CM.
>
> According to CM, once she was in the car, the man, later identified as PFC Ransom, pointed his gun at her and told her to undress and then ordered her to perform oral sodomy upon him. CM did so. He thereafter climbed on top of her and raped her. While

PFC Ransom was sexually assaulting her, she saw the appellant look back and grin or smile at her. When the car stopped at a dead end in a wooded area, the appellant announced that it was "his turn."

CM testified that PFC Ransom pulled her by her hair through a barbed wire fence and led her into the woods, and the appellant followed them. She did not see the gun after they left the car, but was fearful that PFC Ransom was still armed. Private First Class Ransom ordered her to get on her knees to perform oral sodomy on the appellant, who had already removed his erect penis from his pants. She complied, placing her mouth on his penis. The appellant thereafter left the area to move the car and did not return.

Meanwhile, local police were looking for the appellant, PFC Ransom, and CM. Based on descriptions provided by PFC Ruiz and additional assistance from her boyfriend, the police stopped the appellant while he was driving PFC Ransom's car along an interstate highway several miles from the scene of the abduction. The appellant was the only occupant, and, just before he emerged from the car, the arresting officers observed him reach down under the front of the driver's seat. A later search of the vehicle disclosed a 9 mm semi-automatic pistol under the driver's seat and clothes (jeans, sweater, and underwear) belonging to CM in the back and front seats.

When questioned by one of the arresting officers, the appellant first claimed that he had borrowed the car from a friend and was taking some other friends to a club in Seattle. He then stated that he had dropped the friends off at Fort Lewis and was going on to the

club by himself, but could not explain why. He made no mention of CM's abduction.

In a taped statement made to police detectives in the early morning hours of 18 October, the appellant admitted that he and PFC Ransom had been driving around in the early evening of 17 October. In the statement, the appellant asserted that as they neared the appellant's house, PFC Ransom told him to stop. He did not know what PFC Ransom was doing until he heard "the scream and holler." He saw CM forced into the car, and then PFC Ransom told him to drive. He said that he did as he was told, stopping the car in a wooded area and entering the woods with PFC Ransom and CM. He indicated that PFC Ransom told CM to "give me [the appellant] some" but denied that CM actually performed oral sex on him. He stated that CM grabbed his genitals through his clothing. The appellant then returned to the car because he was scared. The tape of this interrogation was played for the court members, and a transcript was introduced as a prosecution exhibit.

54 MJ at 719-20 (footnote omitted).

The Court of Criminal Appeals then fully delineated the proffered defense evidence, which was rejected by the military judge.

B. The Testimony of Private New

The challenged evidentiary rulings stemmed from the testimony of Private (PV2) New, a pretrial confinee at the regional confinement facility where the appellant and PFC Ransom were also being held in pretrial confinement. Testifying under a grant of

leniency,[2] PV2 New recounted certain statements that the appellant made while they were cellmates.

Private New's testimony on direct examination tracked fairly closely with the appellant's taped statement to the local police. According to PV2 New, the appellant said that he and PFC Ransom had been driving around for some time when PFC Ransom told the appellant to stop near two women, and that the appellant had no idea that PFC Ransom was going to abduct one of them until PFC Ransom dragged CM into the car.

Private New recounted the appellant's observations of PFC Ransom sodomizing and raping CM in the back seat of the car while the appellant drove around. He testified that the appellant described stopping the car in a wooded area, and that PFC Ransom directed CM to perform oral sodomy on the appellant. The appellant told PV2 New that he left the area before any sodomy occurred.

On cross-examination, the defense counsel challenged PV2 New's credibility by exploring the grant of leniency, PV2 New's Canadian conviction for vehicular homicide, his stint in an Arkansas mental hospital as the result of a suicide attempt, his false claims to medical authorities that he was a Special

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[2] Private New disclosed that he was facing trial by court-martial himself for manslaughter, absence without leave, and other military offenses. Canadian authorities had already tried him for dangerous driving that had caused the death of his best friend, another soldier. The military manslaughter charge apparently involved the same death. In exchange for delaying his own trial until he testified against the appellant and PFC Ransom, the grant of leniency involved dropping the manslaughter charge and limiting any sentence on the other offenses to time served in pretrial confinement.

Forces sergeant, and his possible access to transcripts of the appellant's and PFC Ransom's Article 32, UCMJ, hearings while he was their cellmate.

Switching tactics, the defense then sought to elicit additional statements that the appellant made to PV2 New. Specifically, the defense asked PV2 New if the appellant also stated that, at the time of the kidnapping, PFC Ransom pointed a gun at him in the car and ordered him to drive. The military judge sustained a hearsay objection to this testimony, although the defense counsel argued that the "rule of completeness" made the additional statements admissible. This ruling and the military judge's response to subsequent attempts to introduce the same evidence form the basis for the appellant's first assignment of error.

Later in the cross-examination, the defense counsel asked PV2 New if, during a separate conversation with PFC Ransom, PFC Ransom admitted pointing a gun at the appellant. The military judge again sustained a hearsay objection, with comments suggesting that he considered this as the same question the defense had asked earlier. The defense counsel pointed out that he was trying to elicit statements of PFC Ransom to PV2 New, not statements of the appellant to PV2 New, and that the penal interest exception to the hearsay rule applied. In an Article 39(a), UCMJ, session, the defense made a more complete proffer of the out-of-court statement of PFC Ransom that he intended to elicit, but the military judge sustained the prosecution's hearsay objection. This ruling is the basis of the appellant's second assignment of error.

> At the conclusion of the government's case, the defense counsel asked the military judge to reconsider his rulings on the admissibility of the statements that the appellant and PFC Ransom had made to PV2 New. As a proffer of what PV2 New would say, the defense asked that PV2 New's sworn statement, previously marked as a defense exhibit but not admitted, be made an appellate exhibit. The military judge indicated that remarking the statement was not necessary, and adhered to his earlier rulings.

Id. at 720-21 (emphasis added).

Finally, the appellate court below delineated the remainder of the defense evidence at this court-martial.

C. The Appellant's Testimony

> The appellant testified on the merits, and in general, his testimony was consistent with his pretrial statement to the police. He testified that he and PFC Ransom were riding around and listening to music, as they had done many times before. Because PFC Ransom liked to drink (and had drunk to the point of vomiting earlier that evening), the appellant was driving PFC Ransom's car. Although the appellant had consumed some beer himself, he testified that he was not drunk. He indicated that on previous occasions when he and PFC Ransom had gone out, PFC Ransom flirted with women he met.
>
> The appellant testified that he was driving in the general area of his home when PFC Ransom told him to stop near two young women and then left the car. The appellant was collecting his compact disks from the floor of the car and did not hear or see what went on after he stopped the car. When he looked up again, CM was climbing into the car's rear seat with PFC

Ransom, apparently willingly. The appellant denied hearing any screaming or crying, but on cross-examination, admitted that he heard some screaming and yelling when the back door was opened.

In details not included in his taped or oral statements to the police, *the appellant testified that after PFC Ransom entered the car, PFC Ransom put a gun to the appellant's face and ordered him to drive away*. He was scared because PFC Ransom was drunk, so he complied. While driving, the appellant looked into the back seat and saw PFC Ransom on top of CM. He began hitting PFC Ransom in the side repeatedly with his fist in an effort to get his attention.

The appellant testified that he stopped the car at a dead end in a wooded area pursuant to PFC Ransom's instructions. He exited the car with PFC Ransom and CM. He initially denied noticing that CM was nearly naked, but admitted during recross-examination that she was naked from the waist down when they went through the barbed wire fence into the woods. He again denied that CM performed oral sodomy on him. He testified that when PFC Ransom told CM to perform oral sodomy on him, the appellant gave PFC Ransom "a look," and PFC Ransom responded by telling him to move the car. The appellant then left the area because he did not want to have anything to do with what he expected was going to happen; that PFC Ransom was going to rape CM. When he got back to the car, he drove off, leaving CM and PFC Ransom in the woods.

The appellant testified that after being stopped, he lied to the police officers about being on his way to a club in Seattle because things "looked bad" for him.

> Based on the appellant's testimony that he was in fear of PFC Ransom because PFC Ransom was drunk and had pointed a weapon at his head in the car, the military judge instructed the court members on the defense of duress with regard to both offenses of which the appellant was convicted.

Id. at 721-22 (emphasis added).

Appellant makes two claims of evidentiary error in his case. First, he contends that the military judge erred when he suppressed testimony from a fellow pretrial confinee, PV2 New, that appellant had said that his co-accused, PFC Ransom, pointed a gun at him and ordered him to drive at the time of the alleged kidnapping of CM. *See generally* Mil.R.Evid. 304(h)(2), Manual for Courts-Martial, United States (1998 ed.).[1]

Second, he asserts that the military judge erred when he excluded profferred testimony, again from PV2 New, that PFC Ransom also said that he pointed a gun at appellant at that time, probably because he was drunk. (R. 423) *See generally* Mil.R.Evid. 804 (b)(3). On the basis of these evidentiary errors, appellant asserts the "it can hardly be argued that [he] received the fair trial to which he was entitled." Final Brief at 24.

Appellant's evidentiary claims arose in the context of a contested trial, where he was ultimately found guilty of kidnapping and sodomizing CM. He testified in his own defense to the kidnapping charge that his alleged co-actor, PFC Ransom, coerced him into committing this crime by threatening him with a gun. *See* RCM 916(h), Manual, *supra*. He also testified in defense to the sodomy charge that he refused to

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[1] All Manual provisions are identical to the ones in effect at the time of appellant's court-martial.

commit that offense, although PFC Ransom tried to force him to do this act. The alleged victim, however, testified that appellant was a willing participant in committing the charged offenses and that she did not see PFC Ransom threaten appellant with a gun at any time. PFC Ransom did not testify at appellant's trial. An arresting officer and the investigating detective testified that appellant gave different exculpatory stories, neither one mentioning that he was threatened with a gun by PFC Ransom. The Government finally called PV2 New, a fellow pretrial confinee of appellant and PFC Ransom, to testify to various admissions made by them prior to trial. The defense sought the excluded testimony on PFC Ransom's purported threat on cross-examination of PV2 New.

I

Appellant asserts that PV2 New's proffered testimony that appellant said he was threatened by PFC Ransom at the time of the kidnapping was admissible under Mil.R.Evid. 304(h)(2).[2] He asserts that this exculpatory statement was part of his purported confession, otherwise evidenced on direct examination by the Government's witness, PV2 New. The appellate court below held that the trial judge erred in excluding this testimony, but it was harmless. It conducted a detailed analysis of this purported error in the context of appellant's court-martial and said:

> Had the appellant's statement to PV2 New been admitted, we are confident that the credibility assessment would still have heavily favored CM's recitation of events. Having no "grave doubts" about the impact of the excluded evidence on the results

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[2] It states: "*Completeness.* If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement."

> obtained at trial, we conclude that the appellant suffered no material prejudice from the erroneous exclusion of PV2 New's testimony. *See* UCMJ art. 59(a), 10 USC § 859(a); *United States v. Pollard*, 38 MJ 41, 52 (CMA 1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 . . . (1946)).

54 MJ at 725.

We agree with the appellate court below for several reasons. First, appellant himself was allowed to testify that his participation in CM's kidnapping was coerced by PFC Ransom's threatening conduct with a gun and that he did not sodomize her. *See United States v. Scheffer*, 523 U.S. 303 (1998) (holding no violation of constitutional right of defense where accused allowed to substantially present his defense through other evidence); *United States v. Lea*, 249 F.3d 632, 642 n.8 (7th Cir. 2001). Second, the corroborative value of the excluded evidence that appellant told a fellow pretrial confinee sometime after the crime the same exculpatory story was not great. *See generally United States v. Mathis*, 264 F.3d 321, 342-44 (3rd Cir. 2001) (in context of record as a whole, excluded testimony was highly unlikely to have caused a different result). Finally, any corrective value which the excluded evidence might have had to prevent the members from thinking appellant had confessed to PV2 New was largely minimized by appellant's own testimony in this case.[3]

On this last point, we note the telling words of the appellate court below:

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[3] We reject the dissent's additional assertion that the military judge's ruling excluding evidence of the remainder of appellant's statement to PV2 New prejudicially undercut appellant's trial testimony by showing it to be a recent fabrication. The admission of appellant's pretrial statements to his arresting officer and, later, to an investigating detective amply demonstrated that fact.

> *More significantly, during direct examination, the appellant denied having the conversation in question with PV2 New.* He suggested that PV2 New's knowledge of the events to which he testified derived from reading the transcript of the Article 32(b), UCMJ, investigation that the appellant kept in his cell. *By denying that the conversation to which PV2 New testified actually occurred, the appellant impaled himself on the horns of a dilemma*: on the one hand arguing that his statements to PV2 New were admissible under the rule of completeness and on the other hand arguing that there were no statements to complete. He is now in no position to claim that he was gored.

54 MJ at 725 (emphasis added); *see United States v. Levy-Cordero*, 156 F.3d at 247 (holding that the erroneous exclusion of evidence of facts which accused recanted certainly was harmless error). We agree.

II

The second issue in this case is whether the Court of Criminal Appeals prejudicially erred when it affirmed the military judge's refusal to admit additional testimony from PV2 New which purportedly exculpated appellant. In particular, appellant asserts that the military judge erroneously prohibited the defense from asking PV2 New whether PFC Ransom admitted that he pointed a gun at appellant during the incident with CM. (R. 420, 423) The record reflects that PV2 New would have testified that he asked PFC Ransom,"Why'd you pull a gun at your boy?" and he (Ransom) responded, "I don't know. I guess because I was drunk or something." (R. 426)

Defense counsel asserted at trial that PV2 New's testimony concerning PFC Ransom's out-of-court statement was admissible hearsay under Mil.R.Evid. 804(b)(3), the declaration-against-interest exception to the hearsay rule. (R.

422, 534-36) *See generally Williamson v. United States*, 512 U.S. 594 (1994). The military judge sustained the Government's objection to this proffered defense evidence as hearsay, suggesting he considered it untrustworthy. (R. 427) He was also asked at a later date to reconsider his ruling and make specific findings of fact pertaining to this motion, which he indicated he would do, but which he failed to do. (R. 536) The Court of Criminal Appeals held that the proffered evidence did not qualify as a declaration against penal interest. 54 MJ at 727.

Mil.R.Evid. 804(b)(3) states:

> (b) *Hearsay Exceptions*. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.
>
> * * *
>
> (3) *Statement against interest. A statement which was at the time of its making* so far contrary to the declarant's pecuniary or proprietary interest, or *so far tended to subject the declarant to* civil or *criminal liability*, or to render invalid a claim by the declarant against another, *that a reasonable person in the position of the declarant would not have make the statement unless the person believed it to be true*. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(Emphasis added.)

To gain admission of PV2 New's exculpatory hearsay testimony under this rule, it was appellant's burden to show, *inter alia*, that (1) PFC Ransom was unavailable to testify at trial, (2) PFC Ransom's statement was against his penal interest, and (3) corroborating circumstances clearly indicated the trustworthiness of the statement. *See United States v.*

Paguio, 114 F.3d 928, 932 (9th Cir. 1997); *United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995).

The Court of Criminal Appeals held, *inter alia*, that appellant failed to show PFC Ransom's out-of-court statement was actually against his penal interests. (Requirement 2) *See generally United States v. Tropeano*, 252 F.3d 653, 659 (2d Cir. 2001) (recognizing a "sufficiently self-inculpatory" standard for determining whether out-of-court statements qualify as declarations against penal interest). In this regard, we note that PFC Ransom's statement was evasive on its face and fell far short of an unambiguous admission to coercing appellant to commit a crime by pointing a gun at him. *See United States v. Seabolt*, 958 F.2d at 233; *cf. United States v. Thomas*, 571 F.2d 285, 288 (5th Cir. 1978) (direct confession not required, only disserving statements which would have probative value against declarant).

Moreover, to the extent he did so implicitly, he attempted to diminish his culpability by blaming his conduct on overindulgence in alcohol. *See generally* RCM 916(l)(2) (evidence of voluntary intoxication may be introduced to disprove specific intent offenses); *see also United States v. Jacobs*, 44 MJ 301, 306 (1996); *United States v. Fowlie*, 24 F.3d 1059, 1068 (9th Cir. 1994) (statement not against interest where it indicates that declarant thinks he would not be prosecuted for admissions). We conclude that the appellate court below did not err in holding that PV2 Ransom's statement did not sufficiently expose him to criminal liability to the extent that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. *Williamson v. United States*, 512 U.S. at 603-04.

Assuming error in this regard, we next turn to the question of trustworthiness under Mil.R.Evid. 804(b)(3). (Requirement 3) A preliminary decision must be made by the military judge whether there exist "corroborating circumstances which *clearly*

indicate the trustworthiness" of the out-of-court statement. *United States v. Price*, 134 F.3d 340, 347-48 (6th Cir. 1998)(emphasis added). In *United States v. Rasmussen*, 790 F.2d 55, 56 (8th Cir. 1986), the Eighth Circuit delineated several circumstances which bear on this question:

> The trustworthiness of a statement against the declarant'spenal interest is determined by analysis of two elements: "the probable veracity of the in-court witness, and the reliability of the out-of-court declarant." *Alvarez, supra*, 584 F.2d at 701. Factors to be considered in such an analysis include: (1) whether there is any apparent motive for the out-of-court declarant to misrepresent the matter, (2) the general character of the speaker, (3) whether other people heard the out-of-court statement, (4) whether the statement was made spontaneously, (5) the timing of the declaration and the relationship between the speaker and the witness. *Id.* at 702 n.10.

The record before us in this case established several circumstances relevant to this trustworthiness question. *See United States v. Bumpass*, 60 F.3d at 1102. First, PFC Ransom, the out-of-court declarant, had a motive for misrepresentation in this matter. PV2 New's pretrial statement (Defense Exhibit A for ID), which was before the military judge, asserts that "Benton said he was going to testify against Ransom if Ransom wouldn't sign a paper saying Benton didn't do anything." (R. 417-18) *See United States v. Bumpass*, 60 F.3d at 1103. Second, in view of the numerous serious offenses charged against PFC Ransom concerning CM, there was a low probability PFC Ransom would ever be additionally charged or punished for aggravated assault on his co-accused or perjury. *See United States v. Silverstein*, 732 F.2d 1338, 1346 (7th Cir. 1984). Third, nobody else heard the statement purportedly made by PFC Ransom to PV2 New, a fellow pretrial confinee,

and it was made in circumstances suggesting that it was mere jailhouse braggadocio. *See United States v. Sanchez-Satelo*, 8 F.3d 202, 213 (5th Cir. 1993); *United States v. Seabolt*, 958 F.2d at 233; *cf. United States v. Hamilton*, 19 F.3d 350, 357 (7th Cir. 1994). Finally, the purported statement was not made spontaneously, but in response to a specific question asked by a fellow pretrial confinee, who had previously discussed this case in great detail with the subsequently exonerated co-accused. *Cf. United States v. Thomas*, 571 F.2d 285, 290 (5th Cir. 1978).

Appellant had a heavy burden to establish corroborating circumstances clearly indicating the trustworthiness of PFC Ransom's out-of-court statement. *See United States v. Bumpass, supra*. The record before us, however, overwhelmingly supports the conclusion of the judge that such circumstances did not exist in this case. *Cf. United States v. Paguio*, 114 F.3d at 933 (where evidence cuts both ways on trustworthiness, statement should be admitted for the jurors' determination). Instead, the circumstances in this case clearly show the exact type of evidence that Mil.R.Evid. 804(b)(3) was designed to preclude. *See United States v. Silverstein, supra* (the rule was designed to circumvent fabrication by the defendant's pals where there was little chance that the pals would be prosecuted).

The decision of the United States Army Court of Criminal Appeals is affirmed.

CRAWFORD, Chief Judge (concurring in the result):

Appellant seeks to overturn his conviction in this case by claiming that the military judge erred in failing to admit two statements by a pretrial confinee, PV2 New, that could have been employed to exonerate appellant. First, appellant told PV2 New that PFC Ransom pointed a gun at appellant; and second, Ransom told New that Ransom pointed a gun at appellant. Both Ransom and appellant were charged with numerous offenses, and appellant was convicted of forcible sodomy and kidnapping of the victim.

Statements may be admitted under Mil. R. Evid. 804(b)(3), Manual for Courts-Martial, United States (2000 ed.), to exonerate the defendant or implicate the defendant. Rule 804(b)(3) demands corroboration only when the defense offers an exonerating declaration against interest. There is no requirement for corroboration when the prosecution seeks to admit statements implicating the defendant. I would hold that any error in this case is harmless and leave for another day the constitutionality of Rule 804(b)(3).

The victim testified that appellant turned and looked at her several times while she was being raped. The contention that appellant was driving the car while Ransom, over an extended period of time, was raping the victim, and at the same time forcing appellant to drive the car, strains credulity. New's testimony that appellant said Ransom pointed a gun at him was specifically denied by appellant during the trial. Likewise, Ransom's statement that he pointed a gun at appellant is unclear and ambiguous. Additionally, as the majority indicates, Ransom's statement did not reasonably expose him to any more criminal liability than he already faced. Because the defense failed to establish the trustworthiness of Ransom's statement, the judge did not abuse his discretion in excluding it.

EFFRON, Judge (dissenting):

I agree with the majority opinion that the military judge erred in excluding the exculpatory portions of Private (PV2) New's testimony about appellant's admissions. I respectfully dissent, however, from the majority opinion's conclusion that the error was harmless.

I. THE PRETRIAL STATEMENT AND EVIDENCE OF DURESS

Appellant was charged with participating with Private First Class (PFC) Taori Ransom in a variety of crimes against Ms. CM, including rape, kidnapping, and forcible sodomy. Appellant and PFC Ransom were placed in pretrial confinement, where they met PV2 New. Prior to appellant's trial, PV2 New informed law enforcement personnel that he and appellant had discussed the charges against appellant. PV2 New provided a sworn, written statement relating his conversation with appellant, which includes the following:

> Benton told me that he and Ransom were driving around when they saw two girls in Woodbrook and they were going to "mack on them." I understood "mack" to mean sex or something. . .. Ransom got out of the car, and Benton said he saw Ransom hit one of the females on the head with a gun. Ransom then pushed the girl in the car. Benton said Ransom put the gun to his (Benton's) head and said "drive, drive, go," or words to that effect.

Benton said he pulled over to the side of the road; Ransom did not tell him to stop. Benton said he pulled into a dead end and turned the car around. According to Benton all three people...got out of the car. Ransom told the girl to "hook my boy up," or words to that effect. Benton told me that the female victim began to undo his (Benton's) pants and was going to

perform oral sex on him, then he changed his mind and pulled his pants up.

According to New, Benton also told him he saw Ransom have oral sex, sexual intercourse, and anal sex with the victim.

II. THE INCOMPLETE STATEMENT AND MISLEADING PRESENTATION OF THE PRETRIAL STATEMENT AT TRIAL

At trial, PV2 New testified as a witness for the prosecution. The prosecution used New's testimony to introduce appellant's out-of-court statements as evidence of appellant's participation in the charged offenses. During the direct examination, the prosecution elicited the substance of New's entire pretrial statement regarding his discussion with appellant, with one major exception. Trial counsel carefully avoided any questions about New's pretrial assertion that, according to his conversation with appellant, Ransom had placed a gun to appellant's head when Ransom returned to the car with Ms. CM. Despite omitting that critical element of his pretrial statement, PV2 New told the court-martial that appellant had told him "everything" about the incident.

On cross-examination, defense counsel sought to elicit that portion of New's pretrial statement describing Ransom placing a gun to appellant's head. Trial counsel objected, asserting that the question called for inadmissible hearsay. Defense counsel countered that the statement was admissible under the rule of completeness. The military judge sustained the objection and precluded the testimony.

Appellant subsequently testified. The critical point of his testimony was that he was coerced into committing the offenses as a result of Ransom placing a gun to his head. He also denied that he had made any statement to PV2 New. In light of appellant's testimony that he was coerced by Ransom placing

a gun at his head, the military judge instructed the members on the defense of duress. *See* RCM 916(h), Manual for Courts-Martial, United States (1998 ed.).

The members returned a mixed verdict, convicting appellant of several offenses and acquitting him of several offenses. On direct review, the Court of Criminal Appeals held that the military judge erred by precluding New from testifying as to that portion of his statement recounting appellant's description of Ransom placing a gun to his head. The court, however, concluded that the error was harmless, a view that has been adopted in the majority opinion.

III. THE PREJUDICIAL IMPACT OF THE MILITARY JUDGE'S ERRONEOUS RULING

The majority opinion offers three grounds in support of the proposition that the error was harmless. First, the majority opinion contends that the error was harmless because appellant was allowed to present his defense -- duress -- through other evidence. The purpose of the rule of completeness, however, goes beyond allowing an accused to introduce exculpatory statements. The purpose is to ensure that the factfinders are not misled as to the nature and quality of the accused's statement. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 n.14 (1988)

In the present case, the members were misled. The problem with PV2 New's in-court testimony is that it created the erroneous impression that appellant had told New "everything" about the incident -- and that "everything" amounted to an unqualified, inculpatory statement. In that form, New's testimony undercut appellant's in-court testimony by making appellant's in-court statement regarding duress appear to be a recent fabrication.

The essence of the defense contention on appeal is not that New's complete testimony was needed to establish the defense of duress. The issue raised by the defense is that the incomplete nature of New's testimony contradicted appellant's in-court testimony. As the Supreme Court has emphasized, the rule of completeness is designed to ensure "that the court not be misled because portions of a statement are taken out of context" and to avoid "the danger that an out-of-context statement may create such prejudice that it is impossible to repair by a *subsequent* presentation of additional material." *Id.*

The majority opinion also contends that the error was harmless because there was not much corroborative value in the fact that appellant's in-court testimony was the same as the statement he made to another person in confinement shortly after the crime. The critical problem, as noted above, was not the absence of corroborative testimony. The problem was that appellant's in-court testimony was undercut by the glaring difference between his testimony at trial -- raising the defense of duress -- and New's selective testimony about appellant's pretrial statement -- leaving the impression that there was no such coercion.

The majority opinion further contends that the error was harmless because when appellant denied making any statement to New, his position "largely minimized" any value of the excluded testimony. __ MJ at (*12*). The majority opinion suggests that appellant created a "dilemma" by arguing both that the evidence was needed to complete his statement to New and that he made no such statement. The problem in this case was not created by the defense, but by the prosecution's misleading and incomplete account of the pretrial statement.

This is not a case of the defense affirmatively seeking to introduce an exculpatory pretrial statement into the trial as part of the defense case-in-chief. New's testimony was interjected

into the trial by the prosecution, not the defense. The decision to present New's recollection in a selective rather than a comprehensive manner was made by the prosecution, not the defense. The ruling of the military judge was prejudicial to appellant's right to have the members assess the credibility of appellant's duress. The ruling allowed the prosecution to present an incomplete, misleading account of appellant's pretrial statement, an account which left the impression that appellant had changed his story prior to trial.

It is also noteworthy that the prosecution's presentation was far from compelling, as evidenced by the fact that the panel members did not accept the prosecution's primary theory of the case. The prosecution's theory was that appellant and Ransom planned and executed the attack on CM. The members, however, acquitted appellant of all the specifications involving vicarious liability for the acts of PFC Ransom, as well as the specification involving conspiracy. He was convicted only of the offenses to which the duress defense was most directly applicable -- kidnapping and forcible sodomy.

The ruling of the military judge meant that the evidence which the members took into the deliberation room consisted of conflicting testimony between the victim and appellant, and what appeared to be a complete and unqualified pretrial confession by appellant to his cellmate. The members were left with the impression that appellant had never told anyone prior to trial that PFC Ransom had pointed the gun at him. The members easily could have concluded that appellant concocted this story in preparation for trial in order to create a defense. Under these circumstances, the error was prejudicial.

APPENDIX B

UNITED STATES, Appellee
v.
Specialist Anson D. BENTON,
United States Army, Appellant

ARMY 9800862

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

January 22, 2201, Decided

Before CAIRNS, BROWN, and VOWELL, Appellate Military Judges. Senior Judge CAIRNS and Judge BROWN concur.

OPINION OF THE COURT

VOWELL, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of forcible sodomy and kidnapping of CM, in violation of Articles 125 and 134, Uniform Code of Military Justice, *10 U.S.C. § § 925* and 934 [hereinafter UCMJ]. The appellant was acquitted of numerous other offenses involving CM and two other alleged victims. The convening authority approved the adjudged sentence of confinement for two years and six months, forfeiture of all pay and allowances, a bad-conduct discharge, and reduction to Private E1.

In three assignments of error in this Article 66, UCMJ, appeal, the appellant challenges two evidentiary rulings of the military judge pertinent to his duress defense and contends that

his conviction of forcible sodomy is legally and factually insufficient. We agree that the military judge abused his discretion in refusing to permit a witness to testify to certain exculpatory statements made by the appellant, but finding no prejudice, we decline to grant relief. We find the second challenged evidentiary ruling to be legally correct. Both of the evidentiary issues warrant discussion. We find the legal and factual sufficiency argument to be without merit, and will not discuss it further.

FACTS

On the evening of 17 October 1997, the appellant and his alleged accomplice, Private First Class (PFC) Taori Ransom, spent several hours driving around in the vicinity of Lakewood, Washington, an area near Fort Lewis. The appellant, who was driving PFC Ransom's car, stopped the car at PFC Ransom's direction near two young women, CM and her cousin, PFC Ruiz. Much of CM's chilling account of her kidnapping, rape, and forcible sodomy by PFC Ransom that evening was unchallenged at trial, although the appellant vigorously contested his criminal liability for what transpired.[1] Some of the evidence surrounding the offenses of which the appellant was acquitted places the challenged evidentiary rulings in context and is thus included in our discussion of the facts.

A. The Government's Case

CM and PFC Ruiz both testified that they were talking outside the home of PFC Ruiz' boyfriend when they heard a car pull up. They saw a man leave the car and walk toward them,

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[1] The appellant was acquitted of nearly all the offenses where criminal responsibility was predicated on his vicarious liability for PFC Ransom's actions, including the rape of CM. The appellant was convicted of CM's kidnapping, for which the government contended he was liable as an actual perpetrator, as a principal, or as a co-conspirator.

brandishing a 9 mm semi-automatic pistol. He grabbed CM's hair and dragged her, screaming and struggling, into his car. When PFC Ruiz attempted to aid her cousin, the man struck PFC Ruiz across the forehead with the pistol. The appellant then drove off with the man in the back seat with CM.

According to CM, once she was in the car, the man, later identified as PFC Ransom, pointed his gun at her and told her to undress and then ordered her to perform oral sodomy upon him. CM did so. He thereafter climbed on top of her and raped her. While PFC Ransom was sexually assaulting her, she saw the appellant look back and grin or smile at her. When the car stopped at a dead end in a wooded area, the appellant announced that it was "his turn."

CM testified that PFC Ransom pulled her by her hair through a barbed wire fence and led her into the woods, and the appellant followed them. She did not see the gun after they left the car, but was fearful that PFC Ransom was still armed. Private First Class Ransom ordered her to get on her knees to perform oral sodomy on the appellant, who had already removed his erect penis from his pants. She complied, placing her mouth on his penis. The appellant thereafter left the area to move the car and did not return.

Meanwhile, local police were looking for the appellant, PFC Ransom, and CM. Based on descriptions provided by PFC Ruiz and additional assistance from her boyfriend, the police stopped the appellant while he was driving PFC Ransom's car along an interstate highway several miles from the scene of the abduction. The appellant was the only occupant, and, just before he emerged from the car, the arresting officers observed him reach down under the front of the driver's seat. A later search of the vehicle disclosed a 9 mm semi-automatic pistol under the driver's seat and clothes (jeans, sweater, and underwear) belonging to CM in the back and front seats.

When questioned by one of the arresting officers, the appellant first claimed that he had borrowed the car from a friend and was taking some other friends to a club in Seattle. He then stated that he had dropped the friends off at Fort Lewis and was going on to the club by himself, but could not explain why. He made no mention of CM's abduction.

In a taped statement made to police detectives in the early morning hours of 18 October, the appellant admitted that he and PFC Ransom had been driving around in the early evening of 17 October. In the statement, the appellant asserted that as they neared the appellant's house, PFC Ransom told him to stop. He did not know what PFC Ransom was doing until he heard "the scream and holler." He saw CM forced into the car, and then PFC Ransom told him to drive. He said that he did as he was told, stopping the car in a wooded area and entering the woods with PFC Ransom and CM. He indicated that PFC Ransom told CM to "give me [the appellant] some" but denied that CM actually performed oral sex on him. He stated that CM grabbed his genitals through his clothing. The appellant then returned to the car because he was scared. The tape of this interrogation was played for the court members, and a transcript was introduced as a prosecution exhibit.

B. The Testimony of Private New

The challenged evidentiary rulings stemmed from the testimony of Private (PV2) New, a pretrial confinee at the regional confinement facility where the appellant and PFC Ransom were also being held in pretrial confinement. Testifying under a grant of leniency,[2] PV2 New recounted

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[2] Private New disclosed that he was facing trial by court-martial himself for manslaughter, absence without leave, and other military offenses. Canadian authorities had already tried him for dangerous driving that had caused the death of his best friend, another soldier. The military manslaughter charge apparently involved the same death. In exchange for

certain statements that the appellant made while they were cellmates.

Private New's testimony on direct examination tracked fairly closely with the appellant's taped statement to the local police. According to PV2 New, the appellant said that he and PFC Ransom had been driving around for some time when PFC Ransom told the appellant to stop near two women, and that the appellant had no idea that PFC Ransom was going to abduct one of them until PFC Ransom dragged CM into the car.

Private New recounted the appellant's observations of PFC Ransom sodomizing and raping CM in the back seat of the car while the appellant drove around. He testified that the appellant described stopping the car in a wooded area, and that PFC Ransom directed CM to perform oral sodomy on the appellant. The appellant told PV2 New that he left the area before any sodomy occurred.

On cross-examination, the defense counsel challenged PV2 New's credibility by exploring the grant of leniency, PV2 New's Canadian conviction for vehicular homicide, his stint in an Arkansas mental hospital as the result of a suicide attempt, his false claims to medical authorities that he was a Special Forces sergeant, and his possible access to transcripts of the appellant's and PFC Ransom's Article 32, UCMJ, hearings while he was their cellmate.

Switching tactics, the defense then sought to elicit additional statements that the appellant made to PV2 New. Specifically, the defense asked PV2 New if the appellant also stated that, at the time of the kidnapping, PFC Ransom pointed

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delaying his own trial until he testified against the appellant and PFC Ransom, the grant of leniency involved dropping the manslaughter charge and limiting any sentence on the other offenses to time served in pretrial confinement.

a gun at him in the car and ordered him to drive. The military judge sustained a hearsay objection to this testimony, although the defense counsel argued that the "rule of completeness" made the additional statements admissible. This ruling and the military judge's response to subsequent attempts to introduce the same evidence form the basis for the appellant's first assignment of error.

Later in the cross-examination, the defense counsel asked PV2 New if, during a separate conversation with PFC Ransom, PFC Ransom admitted pointing a gun at the appellant. The military judge again sustained a hearsay objection, with comments suggesting that he considered this as the same question the defense had asked earlier. The defense counsel pointed out that he was trying to elicit statements of PFC Ransom to PV2 New, not statements of the appellant to PV2 New, and that the penal interest exception to the hearsay rule applied. In an Article 39(a), UCMJ, session, the defense made a more complete proffer of the out-of-court statement of PFC Ransom that he intended to elicit, but the military judge sustained the prosecution's hearsay objection. This ruling is the basis of the appellant's second assignment of error.

At the conclusion of the government's case, the defense counsel asked the military judge to reconsider his rulings on the admissibility of the statements that the appellant and PFC Ransom had made to PV2 New. As a proffer of what PV2 New would say, the defense asked that PV2 New's sworn statement, previously marked as a defense exhibit but not admitted, be made an appellate exhibit. The military judge indicated that remarking the statement was not necessary, and adhered to his earlier rulings.

C. The Appellant's Testimony

The appellant testified on the merits, and in general, his testimony was consistent with his pretrial statement to the

police. He testified that he and PFC Ransom were riding around and listening to music, as they had done many times before. Because PFC Ransom liked to drink (and had drunk to the point of vomiting earlier that evening), the appellant was driving PFC Ransom's car. Although the appellant had consumed some beer himself, he testified that he was not drunk. He indicated that on previous occasions when he and PFC Ransom had gone out, PFC Ransom flirted with women he met.

The appellant testified that he was driving in the general area of his home when PFC Ransom told him to stop near two young women and then left the car. The appellant was collecting his compact disks from the floor of the car and did not hear or see what went on after he stopped the car. When he looked up again, CM was climbing into the car's rear seat with PFC Ransom, apparently willingly. The appellant denied hearing any screaming or crying, but on cross-examination, admitted that he heard some screaming and yelling when the back door was opened.

In details not included in his taped or oral statements to the police, the appellant testified that after PFC Ransom entered the car, PFC Ransom put a gun to the appellant's face and ordered him to drive away. He was scared because PFC Ransom was drunk, so he complied. While driving, the appellant looked into the back seat and saw PFC Ransom on top of CM. He began hitting PFC Ransom in the side repeatedly with his fist in an effort to get his attention.

The appellant testified that he stopped the car at a dead end in a wooded area pursuant to PFC Ransom's instructions. He exited the car with PFC Ransom and CM. He initially denied noticing that CM was nearly naked, but admitted during recross-examination that she was naked from the waist down when they went through the barbed wire fence into the woods.

He again denied that CM performed oral sodomy on him. He testified that when PFC Ransom told CM to perform oral sodomy on him, the appellant gave PFC Ransom "a look," and PFC Ransom responded by telling him to move the car. The appellant then left the area because he did not want to have anything to do with what he expected was going to happen: that PFC Ransom was going to rape CM. When he got back to the car, he drove off, leaving CM and PFC Ransom in the woods.

The appellant testified that after being stopped, he lied to the police officers about being on his way to a club in Seattle because things "looked bad" for him.

Based on the appellant's testimony that he was in fear of PFC Ransom because PFC Ransom was drunk and had pointed a weapon at his head in the car, the military judge instructed the court members on the defense of duress with regard to both offenses of which the appellant was convicted.

DISCUSSION

A. The "Rule of Completeness"

The appellant contends that the military judge erred by refusing to permit PV2 New to testify to the following statement: "Benton said Ransom put the gun to his [Benton's] head and said 'drive, drive, go' or words to that effect."[3] We

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[3] The initial proffer was not quite as explicit. The defense counsel asked PV2 New, "Isn't it true that Benton told you that Ransom pointed the gun at him?" During the Article 39(a), UCMJ, session held at the conclusion of the government's case-in-chief, the defense proffered PV2 New's sworn statement, taken by the trial counsel, which included the language quoted above. While the military judge might have been confused by the initial proffer, PV2 New's statement was more than adequate under Military Rule of Evidence 103(a)(2) [hereinafter Mil. R. Evid.] to apprise the military judge of the substance of the evidence the defense sought to elicit through cross-examination of PV2 New.

review rulings of the military judge excluding evidence for abuse of discretion. *See United States v. Hyder, 47 M.J. 46, 48 (1997); United States v. Brown, 48 M.J. 578, 582 (Army Ct. Crim. App. 1998).*

To determine whether the trial judge abused his discretion, we must consider the relationship between the evidentiary codifications of the common law "rule of completeness" and other evidentiary rules. Before this court, as before the trial court below, the appellant contends that the rule of completeness is a rule of admissibility. Government counsel argue that the rule of completeness is merely a rule of timing that permits contemporaneous admission of the remainder of a statement upon cross-examination, but only when the remainder is otherwise admissible under the rules of evidence.

The trial counsel correctly noted that the proffered statement was hearsay. *See* Mil. R. Evid. 801(c).[4] The trial counsel argued that, because it was hearsay, the remainder of the appellant's statement to PV2 New had to fit under an exception to the hearsay rule in order to be admissible, the rule of completeness notwithstanding.

The Military Rules of Evidence actually contain two rules codifying the common law "rule of completeness." The first, identical to its federal counterpart,[5] is found in Mil. R. Evid.

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[4] The appellant's statement to PV2 New was an out-of-court declaration offered to prove the truth of the matter asserted--that PFC Ransom put a gun to his head. The statements of the appellant to PV2 New, when offered by the government, were not hearsay as they were admissions by a party opponent. *See* Mil. R. Evid. 801(d)(2)(A). When offered by the appellant, however, the appellant's earlier statements would be hearsay.

[5] Federal Rule of Evidence 106 [hereinafter Fed. R. Evid.] partially codified the common law rule of completeness. *See Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988).*

106, which provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

The second rule of completeness has no federal counterpart. Military Rule of Evidence 304(h)(2) provides: "If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement." Our superior court has indicated that Mil. R. Evid. 304(h)(2) and Mil. R. Evid. 106 share the same policy basis. *See United States v. Morgan, 15 M.J. 128, 131-32 & n.5 (C.M.A. 1983).*

As the government introduced an oral statement of the appellant to PV2 New, Mil. R. Evid. 106, by its own terms, would not apply, as that rule is limited to writings or recorded statements.[6] The trial defense counsel specifically argued that the statements were admissible under Mil. R. Evid. 304, although both counsel and the military judge used the term "rule of completeness" in litigating the admissibility of the statement.

The military judge agreed with the trial counsel that the rule of completeness was not a rule of admissibility and did not overcome the hearsay nature of the appellant's statement to PV2 New. In this appeal, with citations primarily to federal

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[6] *But see United States v. Alvarado, 882 F.2d 645, 650 n.5 (2d Cir. 1989)* (holding that Fed. R. Evid. 106 and Fed. R. Evid. 611(a) make the rule of completeness applicable to oral statements as well); *United States v. Li, 55 F.3d 325, 329 (7th Cir. 1995).* The position of other circuit courts of appeals on the applicability of the rule of completeness to oral statements is less clear. *See, e.g., United States v. Collicott, 92 F.3d 973 (9th Cir. 1996); United States v. Branch, 91 F.3d 699 (5th Cir. 1996).*

decisions, the government again contends that Mil. R. Evid. 304(h)(2) does not operate as an exception to the hearsay rule.[7] These federal precedents have only limited applicability to the military justice system, however, as Mil. R. Evid. 304(h)(2) is, manifestly, a rule of admissibility.[8]

The language in Mil. R. Evid. 304(h)(2) providing that the defense "may introduce the remaining portions" makes it clear that, once the government has introduced part of a statement, the decision to offer the remainder is a tactical call by the defense. It is not, as government appellate counsel urge, merely a rule of fairness that gives the military judge the discretion to admit the remainder of an accused's statement, provided those portions are otherwise admissible under another evidentiary rule.

We hold that Mil. R. Evid. 304(h)(2) provides, as it plainly states, that the defense may introduce into evidence the remainder of an oral statement of an accused when the government has introduced only a portion of it, notwithstanding

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[7] The federal circuit courts of appeals are split as to whether Fed. R. Evid. 106 is a rule of admissibility, providing an independent basis to admit evidence that would otherwise be inadmissible. *Compare United States Football League v. National Football League, 842 F.2d 1335, 1375-76 (2d Cir. 1988), and United States v. Terry, 702 F.2d 299 (2d Cir. 1983)* (holding that Fed. R. Evid. 106 does not compel introduction of evidence otherwise inadmissible), *with United States v. Sutton, 255 U.S. App. D.C. 307, 801 F.2d 1346, 1368-69 (D.C. Cir. 1986)* (interpreting Fed. R. Evid. 106 to permit admission of some otherwise inadmissible evidence). *See also United States v. LeFevour, 798 F.2d 977, 980-82 (7th Cir. 1986)* (commenting that otherwise inadmissible evidence may be admitted under Fed. R. Evid. 106 when necessary to correct a misleading impression given by offering only a portion of it).

[8] The predecessor rule, found in paragraph 140a(6) of the *Manual for Courts-Martial, United States* (1969 ed.), was clearly a rule of admissibility as well.

the hearsay nature of an accused's pretrial statements when offered by the defense.[9] We need not decide whether Mil. R. Evid. 106 is a rule of admissibility rather than a rule of timing, because the appellant's statements were admissible under Mil. R. Evid. 304(h)(2).

The defense sought to introduce the statement by cross-examining PV2 New about the remainder of the appellant's admission. Defense cross-examination of a witness who has testified to oral inculpatory statements of an accused is an appropriate means to introduce other, contemporaneously made, exculpatory statements of an accused. To hold otherwise could lead to absurd results. For example, in a murder case, it would be error to permit the government to introduce an oral statement of the accused in which he admitted firing the fatal shot, while prohibiting cross-examination of the same witness about the accused's next utterance--that he had fired the fatal shot only because the victim was coming at him with a loaded firearm. We do not believe the drafters of the Military Rules of Evidence intended such an absurd result, particularly in light of Mil. R. Evid. 102's admonition to construe evidentiary rules "to the end that the truth may be ascertained and proceedings justly determined."

We conclude that the military judge misinterpreted Mil. R. Evid. 304(h)(2)'s rule of completeness and thus abused his discretion in refusing to permit the defense to elicit exculpatory hearsay statements of the appellant. *See United States v. White, 48 M.J. 251, 257 (1998)* (finding error when "conclusions of law are influenced by an erroneous view of the law"). Military

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[9] We specifically limit this holding to statements of the accused offered under Mil. R. Evid. 304(h)(2). Our superior court has indicated that other evidentiary rules may limit introduction of the remainder of statements offered under Mil. R. Evid. 106. *See United States v. Cannon, 33 M.J. 376, 383 (C.M.A. 1991).*

Rule of Evidence 304(h)(2) made this hearsay evidence admissible and the court members should have been permitted to hear it.[10]

We do not, however, find that this erroneous ruling prejudiced the appellant. The appellant himself testified that PFC Ransom put a gun to his head in the car after PFC Ransom had abducted CM. The evidence of duress was thus squarely before the court members, and after being appropriately instructed on this defense, they rejected it.

Because the ruling did not deprive the appellant of a defense, the error was not of constitutional dimensions. *See United States v. Garcia, 44 M.J. 27, 32 (1996).* The test for nonconstitutional error is "'whether the error itself had [a] substantial influence'" on the findings. *United States v. Armstrong, 53 M.J. 76, 81 (2000)* (citations omitted). Our superior court has analyzed the prejudicial impact of a military judge's erroneous exclusion of evidence by weighing: "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Moolick, 53 M.J. 174, 177 (2000)* (citing *United States v. Weeks, 20 M.J. 22, 25 (C.M.A. 1985)).*

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[10] We also hold that the defense made an adequate proffer of the nature and substance of the excluded testimony. *See* Mil. R. Evid. 103(a)(2). While PV2 New's trial testimony suggested that the exculpatory statements were made in a different conversation from the inculpatory statements, the military judge's repeated interruptions of the defense counsel's attempts to lay a foundation prevented clarification of this issue. The written statement of PV2 New, tendered as part of the defense proffer, clearly reflects that the inculpatory and exculpatory statements were made during the same conversation. We do not find it necessary to decide, as the Air Force court did in *United States v. Benson, 48 M.J. 734, 740 (A.F. Ct. Crim. App. 1998),* whether statements must be made contemporaneously to be admissible under Mil. R. Evid. 304(h)(2)'s rule of completeness.

The government's case with regard to the kidnapping and sodomy offenses was very strong. CM testified that the driver of the car grinned or smiled while observing her being sexually assaulted by PFC Ransom.[11] She also testified that the driver announced that it was "his turn" when he stopped the car in the wooded area. She indicated that she was forced to perform fellatio upon the driver. Civilian police arrested the appellant a few hours after CM's abduction while he was driving a car containing CM's clothing, and the appellant confessed that he was the driver of the car in which CM was abducted. CM was a highly credible witness without a motive to lie. She provided compelling, consistent testimony.

Conversely, the defense's case was very weak. The appellant's trial testimony, like his oral statement to the police when they arrested him on the highway, was inconsistent and illogical. His testimony provided significant information not included in his taped statement to the police. The appellant's claim of duress was undercut because he failed to mention having a loaded gun pointed at his head when he made his statement to police the morning after these events. The appellant's claim of duress was more severely undercut by his testimony that he repeatedly struck PFC Ransom in the car, presumably without fear of being harmed.

The materiality of the excluded statement is questionable. The appellant provided direct testimony that he was under duress when he participated in CM's kidnapping,[12] testimony

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[11] Neither counsel questioned CM about observing the appellant striking PFC Ransom in the car when CM testified during the government's case-in-chief. Neither side recalled her after the appellant testified.

[12] The military judge instructed the court members that the duress defense applied to all of the charged offenses. While nothing precludes the use of inconsistent defenses, the appellant persistently denied having oral sex with CM.

that the court members rejected. Having PV2 New testify that the appellant made a similar self-serving statement to him would not increase the probative value of the appellant's assertion, and would be cumulative. Mere repetition of a statement does not make it more probable or true.[13]

Finally, the quality of the proffered evidence was poor. Private New's own credibility as a witness was severely undermined by the earlier defense cross-examination; his testimony about what the appellant had allegedly told him was unlikely to be given much weight by the court members as a result. More significantly, during direct examination, the appellant denied having the conversation in question with PV2 New. He suggested that PV2 New's knowledge of the events to which he testified derived from reading the transcript of the Article 32(b), UCMJ, investigation that the appellant kept in his cell. By denying that the conversation to which PV2 New testified actually occurred, the appellant impaled himself on the horns of a dilemma: on the one hand arguing that his statements to PV2 New were admissible under the rule of completeness and on the other hand arguing that there were no statements to complete. He is now in no position to claim that he was gored.

Had the appellant's statement to PV2 New been admitted, we are confident that the credibility assessment would still have heavily favored CM's recitation of events. Having no "'grave doubts'" about the impact of the excluded evidence on the results obtained at trial, we conclude that the appellant suffered no material prejudice from the erroneous exclusion of PV2 New's testimony. *See* UCMJ art. 59(a); *United States v.*

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[13] We note that prior consistent statements offered to rebut a charge of recent fabrication must, in most cases, be made before the motive to fabricate arose. *See* Mil. R. Evid. 801(d)(1)(B); *United States v. Hood, 48 M.J. 928, 932-33 (Army Ct. Crim. App. 1998).* This potential basis for admissibility was not raised at trial.

Pollard, 38 M.J. 41, 52 (C.M.A. 1993) (quoting *Kotteakos v. United States, 328 U.S. 750, 765, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946)).*

B. Statements Against Penal Interest

The appellant also challenges the military judge's ruling excluding testimony by PV2 New that, when he asked PFC Ransom why he had threatened the appellant with a gun, PFC Ransom responded that "he [PFC Ransom] did it, but said he did not know why, but that it probably was the alcohol." The defense argued that the testimony was admissible as a statement against PFC Ransom's penal interest.

We ordinarily review a military judge's ruling excluding evidence for an abuse of discretion. *See Hyder, 47 M.J. at 48; Brown, 48 M.J. at 582.* In this case, our review is, of necessity, less deferential because, in spite of the defense counsel's request for findings of fact and conclusions of law as to whether the statement was admissible and in spite of the military judge's agreement to make such findings, the military judge never made them. He simply ruled the proffered statement "untrustworthy." *Cf.* Rule for Courts-Martial 905(d); *United States v. Agosto, 43 M.J. 745, 748 (A.F. Ct. Crim. App. 1995)* ("Where the military judge's findings are silent or clearly erroneous, we may exercise our statutory authority under [Article 66, UCMJ] and find the facts ourselves.").

When the standard of review is abuse of discretion, and we do not have the benefit of the military judge's analysis of the facts before him, we cannot grant the great deference we generally accord a trial judge's factual findings because we have no factual findings to review. *See United States v. Langston, 50 M.J. 514, 517 n.6 (Army Ct. Crim. App. 1999), aff'd, 53 M.J. 335 (2000).* Nor do we have the benefit of the military judge's legal reasoning in determining whether he abused his discretion in ruling the statement inadmissible. *Cf. United States v.*

Reinecke, 30 M.J. 1010, 1015 (A.F.C.M.R. 1990), rev'd on other grounds, 31 M.J. 283 (C.M.A. 1990) ("Without a proper statement of essential findings, it is very difficult for an appellate court to determine the facts relied upon, whether the appropriate legal standards were applied or misapplied, and whether the decision amounts to an abuse of discretion or legal error.").

In spite of this difficulty, we do not perceive an abuse of discretion on this record. Even applying a de novo standard of review, we are confident that the military judge did not err in refusing to admit PFC Ransom's statements to PV2 New because we find that the statement was not one clearly against PFC Ransom's penal interests as defined by Mil. R. Evid. 804(b)(3).

Military Rule of Evidence 804(b)(3) provides that "the following [statements] are not excluded by the hearsay rule if the declarant is unavailable as a witness":

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

> For PFC Ransom's statements to PV2 New to be admissible under this rule, the defense had to establish: (1) that PFC Ransom was unavailable (*see* Mil. R. Evid. 804(b)); (2) that the statement was sufficiently contrary to PFC Ransom's penal interest

that a reasonable person in his position would not have made it unless he believed it to be true; and (3) that corroborating circumstances made the statement trustworthy.

1. Unavailability

For purposes of analysis, we accept that PFC Ransom was unavailable. The defense twice asked the military judge to so rule, and, in spite of his agreement to do so, the military judge failed to explicitly make that ruling. From the record, it is clear that PFC Ransom was facing significant criminal liability for his alleged role in the abduction, rape, and sodomy of CM. Under these circumstances, we will presume that he would invoke his Article 31, UCMJ, rights against self-incrimination if called as a witness, and was thus unavailable within the meaning of Mil. R. Evid. 804(b).[14]

2. Against Penal Interest

Whether the statement was one against PFC Ransom's penal interest is a question of law. *See United States v. Bagley, 537 F.2d 162, 165-66 (5th Cir. 1976).*

The evidentiary rule itself appears to incorporate aspects of both a subjective and an objective standard in determining this issue. It requires that the statement be so against one's interest that "a reasonable person *in the position of the declarant*"

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[14] When the prosecution is seeking to admit the statement of a co-actor against an accused, our superior court has indicated that, absent extraordinary circumstances, the statement will not be admitted on the basis that the witness is unavailable due to an exercise of the right against self-incrimination, as the government may immunize the co-actor. *See United States v. Dill, 24 M.J. 386, 389 (C.M.A. 1987).* We will not apply the same requirement to the accused, as defense requests for immunity, particularly for a co-accused, require an extremely high showing of necessity. *See United States v. Ivey, 53 M.J. 685 (Army Ct. Crim. App. 2000).*

would not have made it unless the statement were true. Mil. R. Evid. 804(b)(3) (emphasis added). Our superior court has applied a subjective test, holding that the criterion is "whether the declarant would himself have perceived at the time that his statement was against his penal interest." *United States v. Greer, 33 M.J. 426, 430 (C.M.A. 1991).*

At the time PFC Ransom made the statement, he was in pretrial confinement facing a life sentence for kidnapping and raping CM. The admission occurred while he was engaged in a casual discussion with a fellow detainee about why he carried a gun. As PFC Ransom told PV2 New, he always carried a gun to protect himself and his family because there are "a lot of people doing some ... fucked up shit." Thereafter, PV2 New asked PFC Ransom: "Why did you point a gun at your boy's head," to which PFC Ransom responded: "I guess because I was drunk or something." It does not appear from the tenor of the conversation that PFC Ransom had any suspicion that his cellmate might be working for the government, and thus that his statement might be used against him. Subjectively, PFC Ransom did not appear to regard his statement as damaging. He appeared oblivious to the fact that he was one of those armed people from whom others might need to protect themselves.

The statement is not one clearly against PFC Ransom's penal interest. The inculpatory aspects of PFC Ransom's tacit admission that he pointed a gun at the appellant are mitigated by the excuse of inebriation. There are no indications in the record that PFC Ransom perceived his statement to be disserving or damaging. The degree to which a statement is inculpatory is a factor we consider in determining its admissibility under Mil. R. Evid. 804(b)(3). *See generally United States v. Burks, 36 M.J. 447, 451 n.2 (C.M.A. 1993).*

On the other hand, PV2 New appeared to view the statement as sufficiently significant to warrant inclusion in his

own sworn statement to prosecutors. Presumably PV2 New was aware that the government wanted to perfect its cases against the appellant and PFC Ransom, and was thus interested in inculpatory statements of either. Since the statement did not by any stretch of the imagination inculpate the appellant, presumably PV2 New viewed it as inculpating PFC Ransom.

Statements against penal interest are recognized as an exception to the hearsay rule because they are likely to be true. *See Greer, 33 M.J. at 430.* A rational person usually does not confess to offenses unless he has, indeed, committed them. In context, however, PFC Ransom's statement is not clearly inculpatory. It stops short of an admission by PFC Ransom that he attempted or offered with unlawful force or violence to do bodily harm to his friend. The statement is consistent with something other than an act of violence by PFC Ransom toward the appellant. When PFC Ransom pushed his screaming and struggling victim into the back seat of his car, he had just used the weapon to assault PFC Ruiz. Once in the car, PFC Ransom may well have waived the gun about, and, in the process, pointed it at the appellant as he directed the appellant to drive off. We are unconvinced that an admission to an inadvertent or momentary pointing of the weapon at the appellant when inebriated would have been perceived by a reasonable person in PFC Ransom's position to be against his penal interest. The statement is more consistent with an acknowledgment of poor weapons discipline than a deliberate threat or an assault upon the appellant. *See United States v. Warner, 25 M.J. 738, 740 (A.F.C.M.R. 1987)* (commenting that the context in which statements are made may reflect whether the declarant's penal interests are "realistically affected").

We conclude that this statement was not clearly against PFC Ransom's penal interest. Assuming, arguendo, that the statement was sufficiently against PFC Ransom's penal interest

to be admissible on that basis, we will examine the third requirement for admissibility under Mil. R. Evid. 804(b)(3).

3. Trustworthiness

The appellant's third hurdle is proof that the statement was trustworthy. Because the statement was offered to exculpate the appellant, he had the burden to demonstrate corroborating circumstances that clearly indicated the statement's trustworthiness. *See Burks, 36 M.J. at 450-51.* The military judge's failure to make explicit findings of fact and conclusions of law is particularly significant here. The military judge simply found the statement "untrustworthy." We are at a loss to know whether he did so because of the appellant's failure to demonstrate corroborating circumstances indicative of trustworthiness or because he found PV2 New's testimony unbelievable.

The distinction is significant, because PV2 New's credibility was severely challenged on cross-examination. If the military judge determined the testimony inadmissible *solely* because he disbelieved PV2 New, he abused his discretion. *See United States v. Nutter, 22 M.J. 727, 730 n.2 (A.C.M.R. 1986)* (fact-finders, not the military judge, must determine whether a witness is believable).[15] Since we are unable to determine from the record before us why the military judge ruled as he did, we

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[15] Most federal courts apply a different rule, permitting the trial judge to weigh the credibility of the in-court witness in determining whether the proffered testimony is trustworthy. *See, e.g., United States v. Bobo, 994 F.2d 524, 528 (8th Cir. 1993); United States v. MacDonald, 688 F.2d 224, 233 (4th Cir. 1982). But see United States v. Katsougrakis, 715 F.2d 769, 777 (2d Cir. 1983).* The Navy-Marine Corps court has considered the trustworthiness of the person testifying to the out-of-court declaration in determining whether the out-of-court statement is trustworthy and therefore admissible. *See United States v. Garrett, 16 M.J. 941, 946 (N.M.C.M.R. 1983), aff'd, 24 M.J. 413 (C.M.A. 1987).*

will grant him little deference on the issue of trustworthiness. *But see Bagley, 537 F.2d at 166-67* (applying a "clearly erroneous" standard of review to a trial judge's determination that a statement lacked trustworthiness, in spite of the trial court's failure to make factual or legal findings).

In *United States v. Rasmussen*, the Eighth Circuit Court of Appeals listed five factors it found significant in determining the trustworthiness of a statement against penal interest: (1) the motive, if any, of the out-of-court declarant to misrepresent the matter; (2) the character of the out-of-court declarant; (3) the presence or absence of witnesses to the out-of-court statement; (4) whether the statement was spontaneous; and (5) the timing of the statement and relationship between the declarant and the witness. *790 F.2d 55, 56 (8th Cir. 1986).* Only the first factor clearly favors admissibility of the relevant statement in this case.

Private First Class Ransom had no motive to misrepresent the appellant's culpability--at least not to exculpate the appellant. Not only had the appellant left him stranded in the woods with his victim, the appellant had also made statements to the authorities implicating PFC Ransom in serious criminal activity.

The last factor could favor admissibility, for the relationship between PFC Ransom and PV2 New would suggest the statement's reliability. While it was made in a custodial setting, the statement was communicated from one inmate to another, rather than to one in a position of authority. On the other hand, PFC Ransom may have had some motive to exaggerate the nature of his own actions, as an expression of prison bravado. The tenor of his statements suggested just that. *Cf. United States v. Dillon, 18 M.J. 340, 344 (C.M.A. 1984)* (considering surrounding circumstances in concluding that the declarant likely considered his admission of drug usage

innocuous). The tone of the conversation did not suggest that PFC Ransom was willingly shouldering the criminal liability for what occurred in an effort to protect the appellant. Rather, it suggested that PFC Ransom failed to appreciate the criminal nature of his own conduct, whether in assaulting CM, PFC Ruiz, or the appellant.

The remaining three factors do not support a finding of trustworthiness. There were no witnesses to PFC Ransom's admissions, other than PV2 New. The statement was made in response to a leading question. What little we know of PFC Ransom's character is based on the trial testimony about him. If we believe the appellant's own testimony, on the evening in question PFC Ransom was drunk to the point of vomiting, and PFC Ransom's response to PV2 New indicated that he was drunk. As we are unable to test PFC Ransom's ability to recall exactly what he did with the handgun when he entered the car, we have no way to determine the reliability of any assertion that he pointed the handgun at his friend.

Military Rule of Evidence 804(b)(3) requires clear corroboration before a statement against interest may be considered to exculpate an accused. *See United States v. Vazquez, 18 M.J. 668, 670 (A.C.M.R. 1984); United States v. Robinson, 16 M.J. 766, 767 (A.C.M.R. 1983).* While other trial evidence established that PFC Ransom owned a handgun and had it in his possession that evening, the appellant's own testimony provides the only corroboration that the handgun was pointed at him in the car. Such corroboration has been held inadequate. *See Burks, 36 M.J. at 450-51* (indicating that corroboration of portions of a statement was insufficient to corroborate the exculpatory aspects vis-'a-vis the appellant). Both CM's testimony, which indicates that the appellant shared PFC Ransom's lascivious motives, and the nature of the relationship between the appellant and PFC Ransom serve to

contradict the appellant's assertion that he was threatened by PFC Ransom.

The appellant also argues that the failure to admit PFC Ransom's statement to PV2 New violated constitutional due process by depriving him of relevant and trustworthy exculpatory evidence, citing *Chambers v. Mississippi, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973),* and *United States v. Johnson, 3 M.J. 143 (C.M.A. 1977).* We hold that the appellant failed to establish the statement's trustworthiness, a threshold requirement for the admission of any evidence. In *Chambers*, the Supreme Court emphasized the considerable assurances of reliability of the excluded evidence. *410 U.S. at 300.* Such assurances are sorely lacking in this case. The Constitution does not compel courts to consider untrustworthy evidence.

In *Johnson, 3 M.J. at 147,* our superior court considered a number of factors bearing on the trustworthiness of a statement offered to exculpate the accused pursuant to *Chambers.*[16] They included: the voluntary nature of the statement; whether Article 31, UCMJ, warnings were given; the level of detail provided about the crime's commission; the statement's consistency (internally and with other evidence adduced); the declarant's motive to commit the offense; the degree to which the statement was inculpatory to the declarant; the presence of witnesses to the declaration; and the level of corroboration available from other witnesses. These factors track closely with those used to evaluate trustworthiness in *Rasmussen, 790 F.2d at 56.* Considering each of these factors relied upon in *Johnson*, we hold that the appellant has failed to demonstrate the trustworthiness of PFC Ransom's statement to PV2 New. The

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[16] This case was tried before the Military Rules of Evidence were adopted. *See Johnson, 3 M.J. at 146 n.3.*

military judge's refusal to admit the statement thus did not violate the appellant's right to constitutional due process.

We have considered the remaining assignment of error and the appellant's submissions pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982),* and find them to be without merit. Accordingly, the findings of guilty and the sentence are affirmed.

Senior Judge CAIRNS and Judge BROWN concur.